

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PRAVEEN KHURANA,

Plaintiff,

vs.

CITY OF NEWPORT, et al.

Defendants.

No. CV-13-00181-JLQ

ORDER RE: PLAINTIFF'S MOTION  
TO DISMISS

BEFORE THE COURT is Plaintiff's Motion to Dismiss (ECF No. 13) and the City of Newport's Response (ECF No. 21). Plaintiff's Motion was submitted to the Court without oral argument.

**I. Discussion**

Plaintiff seeks to dismiss his state law causes of action against the City because he failed to file a "notice of tort claim" prior to filing suit pursuant to Washington statute, RCW 4.96.020. Plaintiff is proceeding *pro se*. He seeks to dismiss the claims, provide the city with notice of tort claim, wait 60 days, and then amend his complaint herein to re-assert the claims. The City's Response states that it would prefer the claims not be dismissed at this time, and would rather address the merits of the claims. The City further states, "the issue of lack of service of the notice of claim will not be raised as a defense by the City, in an effort to keep the matter moving along." (ECF No. 21, p. 2).

The City did not timely file an Answer or otherwise respond to the First Amended Complaint. The court issued an Order to Show Cause. The City filed an Answer (ECF No. 19) in response to the court's Order. The Answer does assert at Paragraph 92, as an affirmative defense, that: "Plaintiff has failed to file a notice of claim upon the City prior to commencing the action." However, also before the court is the Declaration of Brian Christensen, counsel for the City, which states in part: "as stated in the response to plaintiff's motion to dismiss a portion of the

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2 claims, I would prefer to deal with the legal issues involved with all the claims in  
3 the motion I am filing and not unnecessarily delay this matter by having plaintiff  
4 re-file and amend at a later time." (ECF No. 20).

5 The statutory notice requirement is an affirmative defense. The defense can  
6 be waived. See *Brevick v. City of Seattle*, 139 Wash.App. 373 (2007). At the time  
7 Plaintiff's Motion to dismiss was filed, the City had not asserted the defense. The  
8 City's Answer does assert the defense, but two concurrently filed documents,  
9 including the Declaration of counsel for the City, both state they will proceed on  
10 the claims without asserting the defense. Accordingly, the court finds the City has  
11 waived the defense based on the tort claim notice statute. The City's decision to  
12 waive this defense and proceed with adjudication on the merits is commendable,  
13 and in the interests of judicial economy.

14 As Plaintiff is proceeding *pro se*, the court informs Plaintiff that he may  
15 move to dismiss any claim he so chooses pursuant to Fed.R.Civ.P. 41. The court  
16 is denying his Motion at this time because Plaintiff sought to dismiss, and then re-  
17 assert, the claims and cited to Rule 15, governing amendment of pleadings. Thus,  
18 it appears Plaintiff sought to dismiss the claims only because of the City's tort  
19 claim notice defense, which has now been waived.

20 **IT IS HEREBY ORDERED:**

21 1. Plaintiff's Motion to Dismiss (ECF No. 13) is **DENIED**. Plaintiff's  
22 request to dismiss, with leave to re-assert the claims 60 days later, was based on  
23 the City's tort claim notice defense. The City has waived that defense.

24 2. The Court has considered the City's response to the Court's Order to  
25 Show Cause concerning the untimely filing of the Answer. The Court does not  
26 find the City in default, and accepts the filing of the Answer.  
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2 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order,  
3 furnish a copy to Plaintiff, and to counsel.

4 DATED this 4th day of October, 2013.

5 s/ Justin L. Quackenbush  
6 JUSTIN L. QUACKENBUSH  
7 SENIOR UNITED STATES DISTRICT JUDGE  
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